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5 ***E-FILED - 6/17/09***
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8 IN THE UNITED STATES DISTRICT COURT
9 FOR THE NORTHERN DISTRICT OF CALIFORNIA

10 GIFFORD M. MADDEN,) No. C 08-1907 RMW (PR)
11 Petitioner,)
12 v.) ORDER DENYING
13 B. CURRY, WARDEN,) RESPONDENT'S MOTION TO
14 Respondent.) DISMISS, GRANTING
15) PETITIONER'S MOTION FOR
16) LEAVE TO AMEND PETITION,
17) AND REINSTATING ORDER TO
18) SHOW CAUSE
19) (Docket Nos. 3, 9)
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Petitioner, a state prisoner proceeding pro se, seeks a writ of habeas corpus pursuant to 28 U.S.C. § 2254 challenging a California Board of Parole Hearings (“Board”) decision finding him unsuitable for parole. On September 29, 2008, respondent filed a motion to dismiss. Petitioner opposed the motion, while, at the same time, moving to amend his petition. Respondent filed a reply in support of its motion to dismiss. For the reasons stated below, the court DENIES respondent’s motion to dismiss and GRANTS petitioner’s motion for leave to amend, and REINSTATES the court’s July 1, 2008 order to show cause.

24 **DISCUSSION**
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This court may entertain a petition for a writ of habeas corpus “in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.” 28

Order Denying Respondent’s Motion to Dismiss, Granting Petitioner’s Motion for Leave to Amend Petition, and Reinstating Order to Show Cause

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1 U.S.C. § 2254(a); Rose v. Hodges, 423 U.S. 19, 21 (1975). A district court shall “award
 2 the writ or issue an order directing the respondent to show cause why the writ should not
 3 be granted, unless it appears from the application that the applicant or person detained is
 4 not entitled thereto.” 28 U.S.C. § 2243. Federal courts have a duty to construe pro se
 5 petitions for a writ of habeas corpus liberally. Zichko v. Idaho, 247 F.3d 1015, 1020 (9th
 6 Cir. 2001).

7 The Antiterrorism and Effective Death Penalty Act (AEDPA), 28 U.S.C. § 2242,
 8 “allows for a habeas petition to be amended ‘as provided in the rules of procedure
 9 applicable to civil actions.’” Hebner v. McGrath, 543 F.3d 1133, 1137 (9th Cir. 2008).
 10 Rule 15 of the Federal Rules of Civil Procedure, the civil rule governing amended
 11 pleadings, permits petitioner to amend his petition “once as a matter of course” before a
 12 responsive pleading is served. Fed. R. Civ. P. 15(a)(1). Respondent’s motion to dismiss
 13 does not terminate petitioner’s entitlement to amend his petition because the motion is not
 14 a responsive pleading. See Brewer-Giorgio v. Producers Video, Inc., 216 F.3d 1281,
 15 1284 (11th Cir. 2000) (“the term ‘responsive pleading’ does not include such filings as a
 16 motion to dismiss”). Thus, petitioner retains his right to amend “as a matter of course,”
 17 even though respondent has moved to dismiss.

18 Respondent contends that the court should deny petitioner’s request to file an
 19 amended petition on the grounds that petitioner did not specify which parole
 20 consideration hearing he is challenging, failed to state any specific facts in support of his
 21 claim, and failed to provide case numbers in support of his claim that he had satisfied the
 22 exhaustion requirement.

23 None of these contentions presents a sufficient ground for abrogating petitioner’s
 24 right to amend once “as a matter of course.” The court does not have the discretion to
 25 refuse petitioner’s request to amend prior to the filing of a responsive pleading, whether
 26 or not the proposed amendment would have any practical effect. See Williams v. Bd. of
27 Regents of Univ. Sys. of Ga., 477 F.3d 1282, 1292 n.6 (11th Cir. 2007) (“[w]hen the

1 plaintiff has the right to file an amended complaint as a *matter of course* ... the plain
 2 language of Rule 15(a) shows that the court lacks the discretion to reject the amended
 3 complaint based on its alleged futility"). Furthermore, respondent's arguments are
 4 rendered moot by the fact that petitioner provided the date of the Board hearing which he
 5 is challenging in his opposition and amended petition. The amended petition otherwise
 6 brings the same claims as the original one. Liberally construed, then, petitioner's
 7 allegations are sufficient to require a response.

8 Accordingly, this court reinstates its order to respondent to SHOW CAUSE why the
 9 petition should not be granted.

10 **CONCLUSION**

11 1. Respondent's motion to dismiss (docket no. 3) is DENIED.
 12 2. Petitioner's motion for leave to file amended petition (docket no. 9) is
 13 GRANTED. The clerk of the court shall file the amended petition in the court file.

14 3. The clerk shall serve by mail a copy of this order and the amended petition and
 15 all attachments thereto upon the respondent and the respondent's attorney, the Attorney
 16 General of the State of California. The clerk shall also serve a copy of this order on
 17 petitioner.

18 4. Respondent shall file with the court and serve on petitioner, within **sixty (60)**
 19 **days** of the date this order is filed, an answer conforming in all respects to Rule 5 of the
 20 Rules Governing Section 2254 Cases, showing cause why a writ of habeas corpus should
 21 not be granted. Respondent shall file with the answer and serve on petitioner a copy of all
 22 portions of the underlying state criminal record that have been transcribed previously and
 23 that are relevant to a determination of the issues presented by the petition. If petitioner
 24 wishes to respond to the answer, he shall do so by filing a traverse with the court and
 25 serving it on respondent within **forty-five (45) days** of the date the answer is filed.
 26 Should petitioner fail to do so, the petition will be deemed submitted and ready for
 27 decision **forty-five (45) days** after the date petitioner is served with respondent's answer.

28 Order Denying Respondent's Motion to Dismiss, Granting Petitioner's Motion for Leave to Amend Petition, and
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1 5. Respondent may file a motion to dismiss on procedural grounds in lieu of
2 Governing Section 2254 Cases within **ninety (90) days** of the date this order is filed. If
3 respondent files such a motion, petitioner shall file with the court and serve on respondent
4 an opposition or statement of non-opposition within **forty-five (45) days** of the date the
5 motion is filed, and respondent shall file with the court and serve on petitioner a reply
6 within **fifteen (15) days** of the date the opposition is filed.

7 6. It is petitioner's responsibility to prosecute this case. Petitioner is reminded
8 that all communications with the court must be served on respondent by mailing a true
9 copy of the document to respondent's counsel. Petitioner must keep the court and all
10 parties informed of any change of address by filing a separate paper captioned "Notice of
11 Change of Address." He must comply with the court's orders in a timely fashion. Failure
12 to do so may result in the dismissal of this action for failure to prosecute pursuant to
13 Federal Rule of Civil Procedure 41(b).

14 IT IS SO ORDERED.

15 DATED: 6/16/09


RONALD M. WHYTE
United States District Judge